IN THE SUPREME COURT OF FLORIDA

LARRY THOMAS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO. 95,126

5TH DCA CASE NO. 97-1691

ON DISCRETIONARY REVIEW OF THE
DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

LARRY THOMAS, DC#100471
AVON PARK CORRECTIONAL INSTITUTION
P.O. BOX 1100 / MB#530
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PETITIONER / PRO SE

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SUMMARY OF THE ARGUMENT

The conflict of interest that arose in this case was a combination of personal and professional relationships with a former client, the Molnar family, and defense counsel's present client. Where defense counsel moves to withdraw from representation of a client based upon a close and intimate relationship with a former client, the Molnar family, where such relationship was so strong defense counsel's loyalty to the Defendant is impaired, counsel's certified, written motion to withdraw should be accepted as actual conflict shown and must be granted by the trial court.

Where conflict of interest was demonstrated by the certified, written motion to withdraw in this case, and the trial court failed to make an inquiry into the bases of the conflict sufficient for judicial review and failed to obtain a waiver from the defendant in this case as to continuing to trial without conflict - free counsel, and where Thomas had demonstrated prejudice to the appellate court, the appellate court improperly determined that the trial court had not committed reversible error.

ARGUMENT

THE TRIAL COURT ERRED BY DENYING THE COURT APPOINTED COUNSEL'S MOTION TO WITHDRAW AS COUNSEL, WHICH RULING RESULTED IN THE DENIAL OF APPELLANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

Respondent, the State of Florida (Respondent), contends that the Fifth District Court of Appeal (DCA) properly affirmed the trial court's denial of defense counsel's motion to withdraw.

Respondent contends that defense counsel, James Sweeting (Sweeting) based his motion upon a prior personal working relationship with one of the victim's mother, and the fact that his law firm had represented the same victim's father's law firm in a construction case. This last contention, the respondent's interpretation of the basis for Sweeting's motion to withdraw, is an over simplification of the realities of life in the business community and a misstatement of the actual basis for the conflict Sweeting asserted in his motion to withdraw. A quick reading of Sweeting's motion to withdraw (TAB "A", Petitioner's Brief on Merits) clearly shows that the actual basis for Sweeting's motion is that he, "has discovered that he has had a close and intimate relationship with the mother of one of the victims Jodi Molnar,...." The key words being, "discovered", and "close and intimate relationship." Sweeting went on in points 2., 3., and 4. to further explain the basis of his conflict which was so strong, that Sweeting believed his loyalty to the Defendant (Larry Thomas) is impaired as he cannot consider, recommend, or carry out an

appropriate cause of action for the client (defense).

Respondent, continuously, throughout the brief characterizes Sweeting's relationship with the Molnar family as a personal rather than a professional relationship, thus assuming facts not in evidence, and ignoring the realities of running a law firm, a business, in the Orlando, Florida area.

Respondent contends that absent a clear abuse of discretion a trial court's denial of a motion to withdraw should not be disturbed. Of course, the abuse of discretion in this case occurred because the trial court ignored the doctrine of stare decisis and the case law precluding the reweighing of the factors considered by defense counsel in determining there was a conflict of interest. Further when the trial court did inquire into the factors considered by defense counsel in determine there was a conflict of interest, the inquiry was not comprehensive, nor was it sufficient enough to allow a reviewing court the opportunity for meaningful review, nor did the inquiry contain a question to, and an answer from, the defendant (Larry Thomas) as to his satisfaction with Sweeting's representation up to that date and his willingness to continue to trial once he had been informed of Sweeting's conflict of interest, a waiver of conflict-free counsel. As the D.C.A. mentioned on page 3, footnote 3, of their opinion, "...had the trial judge asked Mr. Thomas' opinion..., that might have avoided this appeal."

The trial court could have conducted a meaningful inquiry, but didn't, that is an abuse of discretion. All this reviewing court,

or the DCA, was left with to review was a statement by the trial judge that he was going to deny the motion to withdraw because he didn't "think" there was a conflict. Based upon what facts is anyone's guess. As an example the trial court could have inquired of Sweeting as to just when he had discovered he had a relationship with on of the victim's mother and as to just how close, and just how intimate, his relationship with Evol Molnar, Jodi Molnar and the Molnar family actually was? Did Sweeting have an oral, or written, referral agreement for legal business with the Molnar family? Did Sweeting believe that a vigorous, successful defense of his client (Larry Thomas) could harm his standing in the community as to civil referrals from the Molnar family and their friends in the Orlando business community? How close were the Sweeting and Molnar families? Did they vacation together, were they partners in any other businesses together? Why did Sweeting actually file his motion to withdraw when he could have stood mute, said nothing and no one, especially his client, would have ever known that he had a close, intimate relationship with Jodi Molnar and the Molnar family? Petitioner Thomas contends that the conflict certified by Sweeting in his written motion must have been severe, and his relationship to the Molnar family must have been very close and very intimate to have forced Sweeting to come before the court and confess, "Judge my case is in a trial posture to a degree." Was the trial judge interested in what degree Sweeting's case was not in a trial posture? The trial judge never inquired. Had he inquired he would have found out that Sweeting had never

utilized an investigator to determine just why every occupant of the Gardner household was sound asleep at 9:30 P.M. on a Tuesday night. Why victim Judd needed a sawed-off .410 shotgun in his bedroom? What type of business victim Judd was engaged in? Were the victims actually asleep or were they under the influence of some type of narcotic drugs at 9:30 P.M.? Why the state attorney's office did not file charges against victim Judd for possession of a sawed-off, short barrelled shotgun prohibited by F.S. Sec. 790.221, where the barrel length was shorter than 18 inches, F.S. Sec. 790.001(10)? Did victim Judd or any other victim have a felony police record? Perhaps no charges were filed by the state attorney against victim Judd because a bargain had been struck where Judd would identify, and testify to, anything the state attorney, or the police officers, requested him to.

Sweeting's investigator could have interviewed and taken statements from petitioner Thomas' sister, Brenda Warren, and her three friends as additional alibi witnesses. While petitioner did not know the full names and addresses of the three friends, Brenda Warren was in possession of this information. Sweeting's investigator could have verified petitioner's explanation of why he had a firearm under his seat when arrested and obtained certified records from Princeton Medical Center on Mercy Drive in Orlando, Florida, that would have shown conclusively that in the month of April, 1996, petitioner was shot once from the rear, the bullet striking petitioner on the inside of his right thigh, passing completely through his leg, as petitioner fled from his assailant,

one Lamar Willis. Copies of the police report of this incident were also available to a competent investigator. Petitioner had told Sweeting of this information and had stated that he'd "rather have a weapon charge, than have Lamar catch him again without a gun and end up dead." Certainly a reasonable explanation for the gun found under the driver's seat of his car at the time of his arrest. An explanation any reasonable person could accept as true when petitioner Thomas testified to it.

Respondent has argued that it would have been "[r]easonable" for Sweeting to advise petitioner Thomas not to take the witness-stand in order to prevent the defendant's criminal history from being related to the jury. (Respondent's Merits brief p. 12). This assumption is patently false. Counsel for respondent must never have been a trial attorney. Sweeting could have very easily first entered into a pre-testimony stipulation with the state as to the exact number of petitioner's prior felony convictions, put petitioner Thomas on the witness-stand and one of the first question Sweeting would ask his client is, "Mr. Thomas how many times have you previously been convicted of a felony?" Petitioner responds with the number of prior felony convictions stipulated to by the state and that would be all the jury would ever hear of Thomas' criminal history. As long as petitioner did not lie about the number of his prior convictions the state is precluded from further inquiry on cross-examination. That's the law in Florida. Further, petitioner has never alleged that the advice Sweeting gave him that influenced him not to testify was that the jury would

learn of his criminal history. The advice Sweeting actually gave petitioner was that he had not been properly prepared to testify, nor was the trial court going to play by the rules. Respondent also argues that petitioner has failed to state what his "reasonable explanation" would have been to overcome all the evidence presented against him. Thus petitioner has failed to demonstrate he was prejudiced by Sweeting's representation. Once again, this argument is also patently untrue. Petitioner has alleged prejudice in his Motion For Rehearing or Rehearing En Banc, (appended hereto as a Record Excerpt at TAB # 1), and further set forth the basic testimony be would have presented to the jury as his "reasonable explanation" for Isaac Hill and the stolen property being in his car when he was stopped by the Orlando Police Department. Petitioner's Motion to Correct and Supplement the Record on Appeal, which contained his "reasonable explanation", was also before the D.C.A., (appended hereto as TAB #2). A copy of both of the aforementioned sworn motions are in Respondent's case file and were before the D.C.A. prior to the final order denying rehearing on February 22, 1999.

As petitioner contended in his initial Merits Brief, his testimony as contained in the Motion at TAB #2; his explanation contained herein as to being shot as why he possessed a gun, his wife's alibi testimony as to his whereabouts at the time of the alleged crime, and Brenda Warren and her three friends alibi testimony, would have entitled Sweeting to request the special jury instruction on circumstantial evidence be given and allowed

Sweeting to move for a judgment of acquittal based upon circumstantial evidence. Bunderick v. State, 528 So.2d 1247 (Fla. 1 DCA 1988).

Respondent has argued that that "[S]weeting never informed the court that he could not perform as a zealous advocate for Thomas." (Respondent's Merits Brief p. 10). Respondent's statement is preposterous. Just exactly what does Respondent think Sweeting's motion to withdraw is all about. If Sweeting could have performed his duty as a zealous advocate in petitioner's defense, there would have been no need for him to file any motion what so ever. But because Sweeting was an honorable man, a respected member of the Florida Bar, and a conscientious officer of the court, he felt compelled to bring the conflict of interest that had so effected his loyalty to his client that he had failed to perfect a viable defense to the attention of the trial judge.

Even if the filing of the motion to withdraw on the day of trial, made it incumbent upon the trial court to determine if an actual conflict existed, and petitioner does not admit that it did, the trial court did not make a sufficient determination that would allow for meaningful review.

Respondent argues that there is noting in the record to demonstrate Sweeting failed to appear at the hearing he had scheduled on the motion to suppress; motion for bill of particulars; and re-hearing on motion to bill at an hourly rate, (See TAB "D", p. 13, Petitioner's Merits Brief).

Likewise, Respondent has argued that petitioner, "has not

demonstrated that the court would have likely granted a motion to suppress the identification of his clothing, or that, even if the identification of the shirt was suppressed, the jury would not have convicted him on the additional evidence presented." See Respondent's Merits Brief pages 11-12.

Of course, this is hardly the standard petitioner needs to satisfy. See generally Carter v. State, 428 So.2d 751, 753 (Fla. 2 DCA 1983).

Petitioner has written to his trial counsel requesting a copy of the Motion to Suppress that Sweeting had written for presentation at the May 15, 1997, hearing he had scheduled. There had been no response from Counsel Sweeting as of the date petitioner signed this brief.

Petitioner believes any competent counsel in this case could prepare a motion to suppress that would satisfy the two-prong test of Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375 (1972).

Certainly if failure by a trial court to rule on a motion to suppress is reversible error, Carter, at 753, then Sweeting's failure to even file the motion when he had scheduled a hearing for that purpose constitutes substantial prejudice, just as failure to show up for the hearing was very prejudicial.

Petitioner Thomas has sworn to the fact Sweeting never appeared at the hearing he scheduled, (TAB #1, p. 3, attached hereto). Petitioner Thomas motioned the D.C.A. to order a transcript of the proceedings had on the May 15, 1997, scheduled hearing, (TAB #2, p. 1, attached hereto), the D.C.A. never rule on

the motion. It is also interesting to note that the state is perfectly capable of obtaining a transcript of the May 15, 1997, hearing or to obtain an affidavit from Sweeting that would demonstrate he did appear at the hearing and did not fail in his duties, yet respondent has not been able to demonstrate Sweeting's appearance and the D.C.A. never ruled upon the motion at TAB #2.

Respondent has spent many pages, and much time, showing this Court that all of petitioner's case law cited in his Merits Brief is distinguishable from Thomas' case. This is true. Of course, it is just as true that all of Respondent's case law, cited in their Merits Brief, is also factually distinguishable from Thomas' case; but petitioner is not going to waste this Court's valuable time in nit-picking the Respondent's case law.

On page twenty of Respondent's merits brief they finally go back to basics and admit that:

> "[C]urrently, a trial court is precluded from reweighing factors considered by defense counsel in determine that there is a conflict in representing two adverse defendants. See Babb, supra.; Nixon v. Siegel, 626 So.2d 1024, 1025 (Fla. 3 DCA 1993)."

Id. Respondent's Merits Brief p. 20

Respondent fails to mention Guzman v. State, 644 So.2d 996 (Fla. 1994) and a conflict between two clients of the public defender's office. Certainly Jodi Molnar was a member of the Molnar family and the Molnar family was a past, and very possibly a future, client of Sweeting. The factual scenario in Guzman was similar to, but not exactly the same, as the factual scenario in

Babb v. Edwards, 412 So.2d 859, 860 (Fla. 1982) or Nixon, supra.

Indeed this Court, or anyone else for that matter, would be hard pressed to find two cases that have the exact same factual scenario, where the issue on appeal was the denial of a motion withdraw and the resultant denial of conflict-free counsel.

Petitioner Thomas has never argued that his case has factually the same as any of the case law cited in his merits brief. Petitioner only argued that the controlling principles of Guzman, supra.; Babb, supra.; and Williams v. State, 622 So.2d 490 (Fla. 4 DCA 1993), control the actions of the trial court in precluding a reweighing of the factors considered by Sweeting in determining that there is a conflict of interest Even after admitting the current state of the law in Florida, Babb, supra.; Nixon, supra., Respondent states that:

> "[A]llowing for removal of counsel where interests are shown to be hostile and adverse does not preclude a trial court from exploring the adequacy of the basis of defense counsel's statements that a conflict exists. Holloway v. Arkansas, 435 U.S. 475, 487 (1977)."

Id. Respondent's Merits Brief p. 21.

Petitioner contends that Respondent's wording of , "exploring the adequacy of the basis of defense counsel's statements that a conflict exists", is the functional equivalent of the Florida Supreme Court's rulings precluding a trial court from, "reweighing factors considered by defense counsel in determining that there is a conflict." The former is allowed by federal law, the latter is precluded by Florida law.

Respondent, by implication, is actually asking this Court to recede from Guzman, supra., Babb, supra., and craft a new Thomas decision more in line with the Respondent's interpretation of Holloway, supra. wherein this Court would draw a distinction between personal conflict and professional conflict. Thus providing the state with the advantage the seek. Being able to exert the state's considerable, persuasive influence over a trial judge to delve into the basis, or factors, considered by defense counsel in determining that a conflict of interest exists. Then persuading a trial judge to reweigh the basis, or factors, and deny the defense motion to withdraw with the resultant advantage passing to the state.

Petitioner's contention is that such a decision by this Court would cause more trouble and additional litigation than it would be worth. The central principles of Guzman, supra., and Babb, supra. should hold where an honorable member of the Florida Bar has in good faith brought the issue of a conflict of interest to the trial court's attention by way of a formal written motion to withdraw. The trial court should not be allowed to reweigh the factors considered by defense counsel in making that determination; but if a trial court does make an inquiry, say to determine the truth of the matters asserted in the motion, or exactly when defense counsel discovered the conflict, or why the motion was filed at such a late date, and then deciding to deny the motion to withdraw, the trial court should be compelled to address the defendant in the case to ascertain whether or not he is satisfied with defense counsel's

representation to that date and if he knowingly and intelligently waives his right to conflict-free counsel pursuant to Zuck v. Alabama, 588 F.2d 436, 440 (5th Cir.) (old Fifth) cert. den. 444 U.S. 833, 100 S.Ct. 63 (1979); Gray v. Estelle, 616 F.2d 801 804 (5th Cir. 1980) (old Fifth); Duncan v. State of Alabama, 881 F.2d 1013 (11th Cir. 1989) (citing to Zuck and Gray as controlling authority on the waiver of conflict-free counsel.) See TAB #1, p. 6)

Absent a meaningful inquiry, sufficient for judicial review by the trial court, or a formal knowing and intelligently waiver of conflict-free counsel by the defendant, the case law of Guzman, supra.; Babb, supra.; Nixon, supra. should have been followed by the trial judge and the D.C.A.

It would appear from the case law of Zuck, supra.; Gray, supra., and Duncan, supra. that this very same problem raised its ugly head in Alabama during the late 1970's and 1980's and was cured by a rule requiring a knowing and intelligent waiver entered into by the defendant in the case when ever a factual scenario arose where a trial court did not feel compelled,

by controlling case law, to grant the motion to withdraw and appoint separate representation. Perhaps this should also be a new rule in Florida as an extension of the Guzman decision to cure the problem that has arisen in this case and other future cases.

Absent a waiver knowingly and intelligently entered into by petitioner Thomas in the trial court the D.C.A.'s decision under review must be reversed. Without the waiver by defendant, absent

meaningful inquiry by the trial court, the D.C.A. should have adhered to the case law of Guzman, supra., followed the doctrine of stare decisis and reversed and remanded petitioner for a new trial with a conflict-free counsel.

CONCLUSION

Because of the well reasoned arguments and case law cited in the reply brief, this Honorable Court should reverse, vacate the judgment and sentence in this case and remand the petitioner, Larry Thomas back to the trial court for a new trial where he will be represented by a conflict-free counsel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF ON THE MERITS has been furnished by U.S. MAIL to counsels for respondent, Belle B. Turner, and Ann M. Phillips at the Office of the Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118 on this 14th day of September, 1999.

Larry Thomas

LARRY THOMAS, DC#100471,MB#530
PETITIONER / PRO SE

Appendix Part 1

IN THE DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA
FIFTH DISTRICT

LARRY J. THOMAS,
Appellant,

v. CASE NO. 97-1691

STATE OF FLORIDA,
Appellee.
_____/

APPELLANT'S MOTION FOR REHEARING OR REHEARING EN BANC

The appellant, LARRY J. THOMAS, pursuant to Florida Rule of appellate procedure 9.330 respectfully moves for rehearing or for rehearing en banc under Rule 9.331(d) of this Honorable Court's decision filed on December 18, 1998, and as grounds therefore states as follows:

While this Court may order rehearing en banc on its own motion, see, e.g., Nancy v. Johns-Manville Sales Crop., 466 So.2d 1113 (Fla. 3d DCA 1985) in light of this opinion, the appellant in caution moves for rehearing en banc, as required by Rule 9.330(a), and La Grande v. B & L Services Inc., 436 So.2d 337 (Fla. 1st DCA 1983).

The appellant is fully aware of the rarity with which appellate courts grant rehearings. However, in view of the seriousness of the issue in this case, a rehearing or rehearing en banc is warranted.

Accordingly, it is with due respect that the appellant request

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this Motion For Rehearing, or consider this en banc, to reconsider or certify the very important issue at hand.

The principal question before this Honorable Court pertains to the violation of appellant's constitutional right to effective assistance of counsel, guaranteed by the Sixth Amendment.

In all criminal prosecutions a person accused of a crime has the right to effective "assistance of counsel". U.S. Constitution, Sixth Amendment. The sixth amendment assures a criminal defendant the right to effective assistance of counsel who is unimpaired by conflicting loyalties. The Supreme Court has recognized that the harm caused by representing conflicting interest is difficult to measure because the harm "is in what the advocate finds himself compelled to refrain from doing..." Holloway v. Arkansas 435 U.S. 475, 490 98 S.Ct. 1173, 1182, 55 L.ed. 2d 426 (1978). Loyalty to a client is also impaired when a lawyer cannot consider, recommended or carry out an appropriate cause of action for the client because of the lawyer's other responsibilities or interest."

DEFICIENCY

On May 15, 1997, counsel failed to report to a Hearing on Defendant's Motion to Suppress. This impeded appellant from prohibiting state in submitting evidence, which had been tainted by illegal police procedures. Counsel's failure in showing at hearing, also hindered appellant in suppressing witnesses' testimonies concerning guns and clothes illegally disclosed to witnesses prior to trial. (Niether issue pertaining to the evidence or testimonies has been presented before this Court, because they were not properly preserved for appellate review).

At the time of the hearing appellant was informed by the Honorable Judge O.H. Eaton, that since your attorney is not present the court would not here the motion to suppress. Thereafter counsel never requested of the court, nor was appellant presented the opportunity to hear defense's suppression motion.

One week before trial state witness Judi Molnar, (client previously represented) did not show for defence depose. On the day of trial it was revealed by state attorney Mr. Hastings, that defense counsel had omitted in subpoenaing Molnar or Gardner for depose. Both were state witnesses, and later testified.

On May 27, 1997, the scheduled date for trial, counsel specifically stated **"Judge my case is in a trial posture to a degree."** Thereafter counsel proceeded to point out precise, apparent differences which hindered counsel and appellant from forming a sound defense. It is further apparent by the record that an actual conflict of interest was present immediately before the starting of trial. Appellant and counsel had "inconsistent interest" in that appellant wished to proceed with his right to trial by jury, and counsel apparently wanted to withdraw as counsel and/or postpone the trial proceedings.

What is further evident is that counsel was not completely prepared for trial. It is obvious by counsel's omission in his duty of preparing a plausible defense that he fully expected either to be withdrawn from the case or have the case postponed.

An "actual conflict" of interest occurs when an attorney has 'inconsistent interest'" Smith v. White, 815 F.2d 1401 (11th Cir)

The Supreme Court has made it clear that prejudice is presumed where an actual conflict of interest adversely affected counsel's performance.

To prove that the conflict "adversely affected his

representation appellant "need not show that the result of the trial would have been different without the conflict of interest, only that the conflict had some adverse effect on counsel's performance."McConico v. Alabama 919 F.2d 1543, 1548 (11th Cir 1990).

In accordance with the requirements of this Honorable Court appellant now will show that counsel's actions or omissions adversely affected counsel's representation.

PREJUDICE

Counsel's failure to appear at the hearing for defendant's motion to suppress barred any possibility appellant might have had to prohibit the prosecution from presenting evidence and testimonies tainted by persuasive police tactics. At no time after was defendant permitted to present his suppression arguments to the court. Thereby prejudicing appellant by allowing state to submit to the jury controversial evidence and testimonies.

By counsel failing to subpoena Ms. Molnar and Mr. Gardner, counsel failed in preparing to impeach witnesses on redirect examination, therefore failing in his duties as appellant's advocate.

The apparent 'inconsistent interest' that evolved between appellant and counsel adversely effected trial counsel representation of appellant. The United States Supreme Court has cautioned that "it is difficult to measure the precise effect on the defense of the representation corrupted by conflicting interest." Strickland, 466 U.S. at 692, 104 S.Ct. at 2067; Holloway v. Arkansas, 435 U.S. 475, 490-91, 98 S.Ct. 1173, 1181-82, 55 L.Ed.2d 426 (1978).

CONCLUSION

The course of a trial can be decisively affected by actions of defense counsel in preparing the case. see e.g. Moor v. United States 432 F.2d 730, 739 (3d Cir.1970) (en Banc) In all due respect to Mr.Sweetings' performance during trial, counsel's omissions in properly preparing for the adversities which the defense undoubtedly faced, be it the tainted evidence or the redirect-examination of the state's witnesses, counsel's performance in preparation, was deficient and therefore prejudice appellant's chances of a reliable result in trial.

In regards to counsel's omission one can only surmise counsel's frame of mind, and that he wholly anticipated to withdraw as counsel from appellant's case.

The wrongdoing cannot solely be placed on the shoulders of counsel and his deficiency, trial court similarly must accede error in not granting counsel's motion to withdraw.

> [O]nce a public defender moves to withdraw from the representation of a client based on a conflict due to adverse or hostile interest between the two clients, under section 27.53 (3), Florida Statutes (1991), a trial court must grant separate representation...
> [A] trial court is not permitted to reweigh the facts considered by the public defender in determining that a conflict exists. This is true even if the representation of one of the adverse clients has been concluded.

Guzman v. State, 644 So.2d 996, 998-999 (Fla. 1994) (citations omitted.

The Eleventh Circuit has held that a defendant may waive the

right to conflict free counsel as long as the waiver is knowingly and intelligently made. Zuck v. Alabama, 588 F.2d 436 440 (5th Cir.) cert. denied, 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed.2d 42 (1979). To be knowing and intelligent, the defendant must be told (1) that a conflict of interest exist; (2) the consequences to his defense from continuing with conflict-laden counsel; and (3) that he has the right to obtain other counsel. Gray v. Estelle, 616 F.2d 801, 804 (5th Cir. 1980); United States v. Garcia, 517 F.2d 272, 276 (5th Cir.1975).

In the instant case concerning "inconsistent interest" the lower tribunal failed to inform appellant of these rights, thus preventing appellant from the opportunity to waive conflict-free counsel.

Respectfully Submitted,

Larry J. Thomas
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Appendix Part 2

IN THE DISTRICT COURT OF APPEAL
IN AND FOR THE STATE OF FLORIDA
FIFTH DISTRICT

LARRY J. THOMAS,

Appellant,

v. CASE NO.: 97-1691

STATE OF FLORIDA,

Appellee.

_____/

MOTION TO CORRECT AND SUPPLEMENT
THE RECORD ON APPEAL

COMES NOW the Appellant, Larry J. Thomas, proceeding pro se, pursuant to Rule 9.200(f), Florida Rules of Appellate Procedure and respectfully moves the Honorable Court to correct the record on appeal in this case prior to reaching any final decision. Apellant respectfully requests the Honorable Court to Correct the record on appeal by supplementing the record with the Motion to Suppress prepared by his trial counsel James Sweeting, III, Esquire and by having this Honorable Court issue an order to have a transcript of the proceedings held on May 15, 1997, at the hearing scheduled by counsel Sweeting, on said M otion to Suppress, where counsel Sweeting never appeared at the hearing he had scheduled. See Exhibit "A".

The subject matter of said Motion Suppress was the clothing identified by the victims at the police department as being worn by one of the perpetrators of the burglary. This clothing was removed from appellant's person at the county jail. The victims, at the

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scene and time of the crime, had never indicated in any statement to investigating officers that one of the perpetrators wore the clothes they were led to identify later at the police department.

Appellant desired to testify at trial and would have offered the following sworn testimony had counsel Sweeting followed through with his promise to come to the county jail and properly prepare appellant to testify. At trial counsel Sweeting warned appellant not to testify because "these people are not going to play by the rules here." Appellant considered his position hopeless with no vigorous representation from his trial counsel.

Appellant's testimony, briefly, would have been to the effect that he was sitting on the hood of his car in front of his house with his sister and 3 friends listening to the car radio when his wife called him to the house to take a phone call from the man who later became appellant's co-defendant in his case. The man on the phone asked appellant to pick him up at his house and transport him to a dope house where he could sell or exchange some jewelery for drugs and or money. Appellant asked the man on the phone why he didn't use his own car and what would appellant get out of it if he came and picked him up. The man on the phone indicated that he wished to keep his car off of the street and he would give appellant a nice gold chain for his trouble. At the time this phone conversation took place the burglary and theft in this case was a completed act. The fact that appellant was at home at the time of the crime was testified to by his wife at trial. Vigorous representation by a fully prepared counsel would have had appellant's phone records in court to substantiate the time of this phone conversation.

Since appellant's wife's birthday was only weeks away, and he wanted a nice present for her, he agreed to drive the man on the

phone to dispose of the jewelery he possessed. While so engaged he was stopped in the car he had just purchased and subsequently arrested. This car was later released from the police impound lot to appellant's wife after she showed the receipt from the title transfer company. This was not a stolen car as the panel indicated in its prior opinion. The current tag on the car did not match the vehicle, although the tag was on the car when purchased, that was the reason for the police stop. By counsel Sweeting misadvising appellant about testifing in his own behalf he deprived appellant of the jury instruction on circumstantial evidence, as appellant's testimony would have established a reasonable alternative, as opposed to the state's allegations, of why the stolen jewelry and guns were found in a car owned by appellant. ie: The man appellant picked up placed the jewelry and one gun in the car, the second gun under appellant's seat was appellant's, and was there when he took the phone call at his home.

In conclusion appellant only wishes to point out to the court that it would seem conclusive as indicated by the 2nd and 3rd paragraph of page 3 of counsel Sweeting's Motion to Withraw (See Exhibit "B") that counsel Sweeting was unprepared for trial, could not and had not conducted a vigorous representation of appellant's case, nor had he carried out an appropriate cause or course of action for appellant because of his other responsibilities to the Molnar family.

WHEREFORE, appellant Thomas respectfully requests the Honorable Court to issue its order upon the clerk of the lower tribunal to supplement the record on appeal with the appellant's Motion to Suppress and Motion for Bill of Particulars, or in the alternative, if the clerk of the lower tribunal reports that no such motions were ever filed by counsel Sweeting, that the Honorable Court issue an order

upon James Sweeting, III, Esquire to produce signed copies of the motions that he prepared for the hearing he had scheduled for May 15, 1997, so that a proper and correct record on appeal will be before this Honorable Court.

Respectfully submitted,

Larry Thomas

LARRY J. THOMAS,DC#100471
AVON PARK CORRECTIONAL INST.
P.O. BOX 1100 / MB#530
AVON PARK, FL 33826-1100

NOTARY ATTEST

STATE OF FLORIDA
COUNTY OF POLK

Sworn to and subscribed before me this 31st day of Janunary, 1999 by Larry J. Thomas who producted a Florida Department of Corrections Identification Card numbered, 100471 as identification.

Signed this 31 day of January, 1999.

Larry Thomas

LARRY J. THOMAS,DC#100471

NOTARY PUBLIC-STATE OF FLORIDA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Correct and Supplement the Record on Appeal has been forwarded VIA U.S. MAIL TO: The Attorney General's Office at 444 Seabreeze Blvd., Ste. 500, Daytona Beach, Florida 32118 on this 31st day of January, 1999.

Larry Thomas

LARRY J. THOMAS, DC#100471